

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LONNIE LONG,

Defendant-Appellant.

UNPUBLISHED

January 24, 2003

No. 234786

Wayne Circuit Court

LC No. 00-011189

Before: Zahra, P.J., and Murray and Fort Hood, JJ.

PER CURIAM.

I. Nature of the Case

Defendant appeals his jury trial convictions for assault with intent to commit murder, MCL 750.83, assault with intent to commit great bodily harm less than murder, MCL 750.84, discharge of a weapon in or at a building, MCL 750.234b, and possession of a firearm during the commission of a felony, MCL 750.227b.¹ The trial court sentenced defendant to thirty to sixty-two years for the assault with intent to murder conviction, one to four years for the assault with intent to commit great bodily harm conviction, three to ten years for the weapon discharge conviction, and two years for the felony-firearm conviction. We affirm.

Defendant's sole claim on appeal is that he was denied the effective assistance of counsel because of a combination of alleged errors defense counsel made during trial. We disagree. Because defendant failed to timely move for a new trial or a *Ginther*² hearing below, our review is limited to errors that are apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). Relevant facts will be reviewed in connection with our analysis of the legal questions raised.

II. Analysis

A. Standard of Review

¹ Defendant appeals as of right.

² *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

To establish a claim that a defendant was denied his constitutional right to the effective assistance of counsel, he must show that his attorney's representation fell below an objective standard of reasonableness and that this was so prejudicial to defendant that he was denied a fair trial. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). To prove prejudice, a defendant must affirmatively demonstrate a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). Effective assistance of counsel is presumed and a defendant bears a heavy burden of proving otherwise. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy and, therefore, a court will not substitute its judgment for that of counsel. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). A defendant must overcome a strong presumption that the assistance of his counsel was sound trial strategy. *Id.* In addition, failure to call witnesses will only constitute ineffective assistance of counsel if the failure deprives the defendant of a substantial defense. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). A substantial defense is one that might have made a difference in the outcome of the trial. *Id.*

B. Alibi Witness

Defendant claims that defense counsel was ineffective for failing to call codefendant Robert Reed as a corroborating alibi witness for the defense. Defendant relies on *People v Johnson*, 451 Mich 115; 545 NW2d 637 (1996), to support his claim; however, *Johnson* is clearly distinguishable. In *Johnson*, defense counsel failed to call six witnesses who would have provided exculpatory eyewitness testimony which clearly could have changed the outcome of the trial. *Id.* at 122. Here, though the jury ultimately rejected defendant's alibi defense, defendant presented an alibi witness, Keith Baldwin, who testified that defendant was with him on the day and time of the shooting. We conclude, therefore, that counsel's failure to call another witness did not deprive defendant of a substantial defense. Furthermore, the record does not support defendant's assertion that Reed would have testified that defendant was not at the scene of the shooting.

Defendant attached an affidavit to his brief on appeal in which Reed declares that he was willing and able to testify at defendant's trial, but that he was not asked to appear. However, Reed did not execute this affidavit until January 2002, almost nine months after defendant's trial. Accordingly, the affidavit is not part of the record and, therefore, will not be considered on appeal. *Rodriguez, supra*, 251 Mich App 38. Thus, defendant has failed to show that a reasonable probability exists that, if counsel had called Reed as a witness, the outcome of the proceedings would have been different. Further, we hold that defendant has failed to overcome the presumption that defense counsel's decision not to call this witness was sound trial strategy.

C. Exculpatory Evidence and Arguments of Counsel

Defendant also argues that trial counsel failed to present other exculpatory evidence. More specifically, defendant contends that counsel failed to further develop an officer's testimony regarding a physical description he obtained that was inconsistent with defendant's physical appearance. Though defendant does not specify the name of the officer, our review of

the record reveals that defendant means to identify Officer Michael Yaw. However, defendant bases his argument on erroneous comments defense counsel made during his closing argument regarding defense witness, Rodney Robinson. Because the physical description did not refer to defendant, any error is harmless.

Defendant also argues that defense counsel failed to give a meaningful opening statement, failed to utilize misidentification as a trial strategy, and made statements during closing argument that bolstered the prosecution's case. Decisions regarding whether to present an opening statement and evidence are presumed to be matters of trial strategy. *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001). In support of his claim, defendant makes generalized contentions regarding counsel's opening statement and closing argument and fails to specify which portions of those arguments were allegedly deficient. Moreover, nothing in the record suggests that defendant was prejudiced by counsel's opening statement or closing argument. Further, contrary to defendant's assertions, our review of defense counsel's arguments and cross-examination reveals that, throughout trial, defense counsel attempted to convince the jury that this was a case of mistaken identity. We hold, therefore, that defendant has failed to demonstrate that defense counsel's statements and arguments were not sound trial strategy.

D. Expert Witness

Finally, defendant says that defense counsel failed to offer any evidence to rebut the testimony of the prosecution's firearms expert witness. The record indicates that, at trial, defense counsel objected to Officer Pauch testifying as an expert witness on the ground that counsel had not received a copy of Pauch's reports until three weeks prior to trial. Defense counsel argued that three weeks was not enough time for him to perform an independent investigation and offer counter expert testimony regarding the firearm. Over defense objection, the trial court allowed Pauch to testify as an expert for the prosecution and ruled that three weeks was sufficient time to retain an expert.

Furthermore, Pauch did not place defendant at the crime, but only testified that the shell casings recovered from the crime scene were fired from the shotgun he examined in his laboratory. The best testimony an expert could have provided defendant is that this was not the shotgun used in the shooting. However, because defendant maintained throughout trial that he was somewhere else at the time of the shooting and that this was a case of mistaken identity, the potential testimony of an expert witness would not have led to a different outcome. Therefore, defendant was not deprived of a substantial defense. *Daniel, supra*, 207 Mich App 58. Accordingly, we conclude that defense counsel's failure to call an expert witness to counter Pauch's firearms testimony did not constitute ineffective assistance of counsel.

We hold that defendant has not demonstrated that defense counsel's assistance was either deficient or prejudicial and, therefore, defendant was not denied the effective assistance of counsel.

Affirmed.

/s/ Brian K. Zahra

/s/ Christopher M. Murray

/s/ Karen M. Fort Hood